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In the

Supreme Court of the United States

October Term 1961

No. 720

MELVIN DAVIS REES, JR.,
Petitioner

v.

COMMONWEALTH OF VIRGINIA,
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

ROBERT Y. BUTTON
Attorney General of Virginia

R. D. MCILWAINE, III
Assistant Attorney General

Supreme Court – State Library Building
Richmond 19, Virginia

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
PRIOR PROCEEDINGS	2
STATEMENT OF FACTS	2
QUESTIONS PRESENTED	3
ARGUMENT	3
I. Evidence Obtained as a Result of a Search of the Home of Petitioner's Parents was Properly Admitted at the Trial of Petitioner	3
II. The Trial Court Properly Declined to Grant Petitioner's Motion for a Change of Venue or Venire	15
CONCLUSION	22

TABLE OF CASES

Chapman v. United States, 365 U. S. 610	15
Ex parte Jackson, 96 U. S. 727	15
Holzhey v. United States, 5 Cir., 223 F. (2d) 823	12, 13
Irvin v. Dowd, 336 U. S. 717	20
Marshall v. United States, 360 U. S. 310	19, 20
Rees v. Commonwealth, 203 Va. 850, 127 S. E. (2d) 406	2, 12, 19

	Page
Sartain v. United States, 9 Cir., 303 F. (2d) 859	12, 13
State v. Evans, 372 P. (2d) 365	14
State v. Zuehlke, 239 Wis. 111, 300 N. W. 746	13
United States v. Blok, D.C.Cir., 188 F. (2d) 1019	13
United States v. Eldridge, 4 Cir., 302 F. (2d) 463	14
United States v. Rees, 193 F. Supp. 849	8, 13

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PRELIMINARY STATEMENT

By letter of the Honorable John F. Davis, Clerk of the Supreme Court of the United States, dated February 18, 1963, the Attorney General of Virginia was requested to file a response to the petition for writ of certiorari in the instant case.* In accordance with the request contained in the above-mentioned communication, written by the Clerk at the direction of this Court, the within brief of the respondent in opposition to the petition for writ of certiorari is filed.

* Post, Appendix A.

PRIOR PROCEEDINGS

On September 28, 1961, petitioner was found guilty by a jury in the Circuit Court of Spottsylvania County of murder in the first degree, and his punishment was fixed at death. His subsequent motion to set aside the verdict was overruled and judgment was entered on the verdict on January 4, 1962. A petition for writ of error to the judgment of conviction was denied by the Supreme Court of Appeals of Virginia on October 8, 1962. See *Rees* v. *Commonwealth*, 203 Va. 850, 127 S. E. (2d) 406. The case is currently before this Court upon petition for writ of certiorari to the Supreme Court of Appeals of Virginia, filed in the Supreme Court of the United States by the petitioner on January 4, 1963.

STATEMENT OF FACTS

The material facts in the case at bar are fully set forth in the opinion of the trial court, which was subsequently adopted as the opinion of the Supreme Court of Appeals of Virginia and appears as Appendix B to the petition for writ of certiorari. See, *Rees* v. *Commonwealth, supra;* Petition for Writ of Certiorari, p. 21. To the extent that it is consistent with the above-mentioned opinion, the statement of the case set out in the petition for writ of certiorari is accepted by the respondent *with the exception* of those matters contained in Appendix A of said petition to which reference is made on pages 5, 6 and 7 of the petition. As counsel for the respondent will subsequently emphasize in Argument II of this brief, *none of the material embraced in Appendix A to the petition for writ of certiorari was offered in evidence, has heretofore been considered by any court or constitutes a part of the record in this case.*

QUESTIONS PRESENTED

I. Was evidence obtained as a result of a search of the home of petitioner's parents properly admitted at the trial of petitioner?

II. Did the trial court properly decline to grant petitioner's motion for a change of venue or venire?

ARGUMENT

I.

Evidence Obtained As a Result of a Search of the Home of Petitioner's Parents Was Properly Admitted at the Trial of Petitioner

In his opinion in the trial court, the Honorable John D. Butzner, Jr., then Judge of the Circuit Court of Spottsylvania County (now Judge of the United States District Court for the Eastern District of Virginia), discussed at length the question presented by petitioner's motion to exclude evidence obtained by agents of the Federal Bureau of Investigation following a search of the home of petitioner's parents—and the factual complex out of which that question arose—in the following statement (203 Va. at 862-866; 127 S. E. (2d) at 415-17):

> "The defendant moved to exclude evidence which was obtained by agents of the Federal Bureau of Investigation in a search of his parents' home. On September 1, 1961, the Court heard testimony, and on September 14, 1961 counsel presented excellent written briefs and argued the motion (T.57-157).
>
> "The Court excluded papers found in the home (Com. Ex. 9a-14 for identification). Admitted into evidence were the gun which the agents found (Com. Ex. 9), and the case in which the gun and papers were found (Com. Ex. 8).
>
> "'On January 24, 1960 F.B.I. agents called at the home of the defendant's parents. The agents advised

them that their son was under arrest in Memphis, Tennessee, on a warrant charging unlawful flight to avoid prosecution in Maryland. The agents asked for permission to search the house and after some discussion permission was granted in writing by Mr. Rees (Com. Ex. 1) and orally by Mrs. Rees. Mr. Rees also assisted by supplying the agents with a light bulb for the attic.

"In the attic the agents noticed a hole cut through the rear of a closet leading to a crawl space. There they found a suitcase, or an accordion case, which they brought downstairs and showed to Mr. Rees. It contained the name, address, and phone number of Dennis J. Werber. Mr. Rees disclaimed any knowledge of the case or of Mr. Werber. He consented to the agents opening the case. This they did by means of a pliers and a screwdriver, since it was secured by a hasp and lock.

"In the case the agents found a gun, which was one of the specific items for which they were looking. They also found a number of papers. Mr. Rees permitted the agents to remove the case and its contents and took a receipt.

"The defendant did not regularly occupy the home in which his parents lived. He claimed to use it as a base of operation but he had not lived there with any frequency or regularity in the last two years. He had not paid any room or board since 1958 except for a small sum paid in the spring of 1960. Whether this was for current or past board was not definitely stated. When the defendant did visit his parents he was treated as a guest. He used whatever part of the premises at that time was most convenient for him to use. He had no regular room or quarters. He did not exclusively occupy and use the attic, or even the crawl space where the case was found. Other members of the household and their guests, from time to time, used various rooms in the house and also the attic. The defendant's father, testified he had cut the opening in

the closet to the crawl space many years before, and he used the crawl space for storage of his belongings.

"The defendant testified he placed the locked case in the crawl space. He retained the key. He admitted ownership of the case and of its contents."

* * *

"The defendant bases his motion upon *Mapp* v. *Ohio*, 367 U. S. 643 (1961) which holds '* * * all evidence obtained by searchers and seizure in violation of the Constitution is, by that same authority, inadmissible in a state court.'

"The issue of the reasonableness of the search is in the first instance for the determination of the trial court. Each case must be decided on its own facts and circumstances. *United States* v. *Rabinowitz*, 339 U. S. 56, 63 (1950).

"The first circumstance to consider is whether the home of Mr. and Mrs. Melvin Davis Rees, Sr., was also the home of the defendant. The Court finds that it was not. His contention that the home was used as his base of operation is without merit. He was a mature man, living with another woman in the apparent relationship of husband and wife. He had established, from time to time, homes in different cities. He was not a regular occupant of his parents' home. No room or quarters were his. Other people used the same room and quarters that he used when he visited his parents. At the time of the search he was living in a distant city. When he did come to his parents' home his status has been clearly described by his father as a 'welcome guest' (T. 132). In short, by every consideration and test common to ordinary usage and meaning, the home which the agents searched was the home of Mr. and Mrs. Melvin Davis Rees, Sr., and not the home of the defendant.

"The Court further finds that the consent to the search was freely and intelligently given by both Mr. and Mrs. Melvin Davis Rees, Sr. There was no actual

or implied coercion. The agents practiced neither trickery nor fraud.

"The accordion case which was found in the attic was in the possession of Mr. Melvin Davis Rees, Sr. The Court finds that he did not claim either the case or the gun were his son's (T. 67, 68, 118). His consent to have it opened was freely given (T. 68). He consented to the removal of the case and its contents after he had an opportunity to inspect them (T. 69).

"The Court finds that the search was not exploratory. The search was not broader than the consent which authorized it. The agents were looking for specific objects connected with the Jackson crime including the gun they found in the case (T. 75, 77, 83, 95, 96).

"The defendant cites *Holzhey* v. *United States*, 223 F. 2d 823 (5th Cir. 1955). The facts in that case differ from those in the case at bar. There evidence was introduced that the defendant was currently renting and occupying the premises and this was coupled with the testimony of an agent that he was put on notice of the defendant's claim to the cabinet which was searched. There, nothing was in the record to indicate that the officers had previous knowledge a crime had been committed. The defendant also relies on *Schwimmer* v. *United States*, 232 F. 2d 855 (8th Cir. 1956). This case is not inconsistent with the holding in the case at bar.

"A number of courts have considered the effect of a parent's consent on the legality of a search and seizure. In *Morris* v. *Commonwealth*, 306 Ky. 349, 208 S. W. 2d 58 (1948) the defendant was charged with murder. A cartridge case was found in the defendant's home. The father consented to a search of the house in which the defendant lived. The evidence was found in the kitchen which was under control of the father. The Court held that consent given by the head of the house, or the person in charge of the house, renders competent the evidence.

"In *People* v. *Galle*, 153 Cal. App. 2d 88, 314 P. 2d 58 (1957) the defendant's mother, at the request of the police, consented to a search of her home. The officers found narcotics in her son's coat pocket. The Court held that the evidence was admissible.

"In *Tomlinson* v. *State*, 129 Fla. 658, 176 So. 543 (1937) an officer told the defendant's father they would like to go in his son's room. The father consented. The officer found a pair of shoes. These were properly admitted in evidence.

"In *State* v. *Hagan*, 47 Idaho 315, 274 P. 628 (1929) a mother consented to the search of a barn on her premises. There the officers found stolen property. The Court held that the evidence was admissible since the search was not unreasonable.

"In *United States* v. *Walker*, 190 F. 2d 481 (2d Cir. 1951) *cert. denied*, 342 U. S. 868 (1951) a motion was made to suppress evidence obtained in a search of defendant's luggage while he was in jail. The luggage was seized and searched in a hotel room of a woman who thought she was the defendant's wife. The agents' entry and search was by her consent. The court held the motion to suppress the evidence thus obtained was rightfully denied for the defendant had no right to object to the search of premises not occupied by him nor to the seizure of property not within his possession.

"In *Woodard* v. *United States*, 102 App. D. C. 393, 254 F. 2d 312 (1958) *cert. denied*, 357 U. S. 930 (1958) a householder took in without rent two boys, one of whom was her grand-nephew. She discovered among other articles several guns. She called the officers and invited them to search. It was held that this search was not unreasonable.

"The Court is of the opinion the search in the case at bar was not unreasonable.

"A very helpful annotation on this question may be found in 31 A.L.R. 2d 1078.

"The gun, which the Commonwealth contends was

the weapon used to commit the crime, was an appropriate object of seizure. Section 19.1-84(5) Code of Virginia 1950."

Moreover, as his counsel point out,* petitioner was tried and convicted in February, 1961, in the United States District Court for the District of Maryland of kidnapping the wife and older daughter of the victim of the homicide for which petitioner was found guilty in the instant case. See, *United States* v. *Rees*, 193 F. Supp. 849. Considering the identical question presented in the case at bar, the Honorable Roszel C. Thomsen, Chief Judge, commented upon the propriety of the same search and seizure, and the admissibility of the evidence sought to be excluded by petitioner, in the following language (193 F. Supp. at 852-854):

"The evidence taken at that hearing showed that on the afternoon of June 24, 1960, the day defendant was arrested in Memphis, Tennessee, a number of agents of the F. B. I. visited the home of defendant's parents in Hyattsville, told them of their son's arrest and said that the agents would like to search the house. Appropriate written authority was given by defendant's father, with the oral approval of defendant's mother. It was a two story house, with an attic reached by a pull-down ladder. There were one or two spare rooms on the second floor, which were occupied from time to time by the children and grandchildren of Mr. and Mrs. Rees, Sr., on visits, and some of defendant's clothes may have been in one of the second floor rooms.

"The search included the third floor attic room, in which various household goods belonging to Mr. and Mrs. Rees were stored along with old school books, etc., belonging to defendant and the other children. An open closet in the attic contained similar material.

*Petition for Writ of Certiorari, p. 5.

In the lower rear wall of the closet one of the agents noticed that the wall had been cut permitting entry into a dark crawl space over the rafters. A flashlight showed a number of items at the far end of this crawl space. One of the items was an old case, which later proved to be an accordion case but looked like a suitcase, padlocked and bearing a tag on which was written "Dennis J. Werber, 811 Delafield Place, N.W., Wash. 11, RA 6-0532." When the case was discovered, the agents asked Mr. Rees if he knew anything about it. He said that he didn't know whose it was, that he had never seen it in the possession of his son, that he did not know Dennis J. Werber, and could not account for its presence "back in this uninhabited portion" of his house. Mr. Rees agreed that it should be opened. It was opened by the agents and was immediately seen to contain a .38 Colt Cobra revolver and a mass of obscene material, including pictures of scantily clad women with penciled drawings added showing their arms tied, etc. Mr. Rees looked over some of the material, said that he had never seen the gun before, and, when asked if it belonged to his boy, answered, not to his knowledge. He said nothing at all about the other material. Mr. Rees consented that the material be taken away by the F. B. I. for further examination and was given a proper receipt. When examined by the F. B. I., the material was found to include an account of the Jackson kidnapping and murder written by defendant in his own handwriting, illustrated with pictures of Mrs. Jackson and Susan taken from a newspaper, with a gag drawn in pencil over Mrs. Jackson's mouth. The account was partly in the first person, extremely brutal and obscene, and contained some details which had never been published in any newspaper.

"Soon after opening the case the F. B. I. called the telephone number shown on the tag, which proved to be the home of Werber's parents. Werber was no longer living there, but his address was obtained and

he denied ownership of anything contained in the case, saying that he had agreed to sell the accordion and case to defendant, but when defendant did not pay for it he had tried to get them back.

"At the hearing on the motion, defendant stated that the case was his, having been sold to him along with an accordion by Werber, although he had never paid for it. He said that he had used it for a while to carry the accordion and for a while to carry clothes while he and Pat Routt were traveling around the country with an orchestra in which he was playing. He said that he had visited his parents' home for a couple of days in the Spring of 1960 while he and Pat Routt were living in an apartment in Washington, before they went to Memphis. He also said that one of those days had been spent preparing the obscene material and that he had stored the whole mass, including the gun, in the case and placed the case in the back of the crawl space. He had said nothing to his parents about it.

"Defendant had a key to his parents' home and could come and go as he pleased. However, he had stayed in the house only two nights during 1960 and had last lived there regularly in the Fall of 1958. Since that time he had been living at various places with Pat Routt, who was not welcome in his parents' home. When he stayed at their house he used several different rooms, including rooms on the second floor and the attic. Those rooms were also used by other members of the family."

* * *

"It was the home of Mr. and Mrs. Rees, Sr., and they had the right to authorize the search of the entire house. No part of the premises had been set aside for the defendant's exclusive use. Calhoun v. United States, 5 Cir., 172 F. 2d 457, certiorari denied 337 U. S. 938, 69 S. Ct. 1513, 93 L. Ed. 1743; Cutting v. United States, 9 Cir., 169 F. 2d 951; Woodard v.

United States, 102 U. S. App. D. C. 393, 254 F. 2d 312; Fredericksen v. United States, 105 U. S. App. D. C. 262, 266 F. 2d 463.

"The search of the case was not unreasonable. The only indicia of ownership was the tag, bearing a name unknown to the owners of the house, with no indication that the case belonged to defendant. It had been left in a crawl space without the knowledge of the owners of the house. Mr. Rees did not know to whom the case belonged; it might have been placed there by him or for him and then forgotten, or it might have been abandoned by a previous occupant of the house. Under the circumstances, Mr. Rees had the right to authorize the F. B. I. to open the case.

"To support a contrary ruling, defendant relies upon Holzhey v. United States, 5 Cir., 223 F. 2d 823. But there the search was conducted in an area of the premises set aside for the defendant's exclusive use and for which she paid rent, and involved a cabinet which was known to be the property of the defendant. Defendant also argues that the case and its contents were in his constructive possession. I find they were not. Such technical considerations of property law are not controlling, Jones v. United States, 362 U. S. 257, 266, 80 S. Ct. 725, 4 L. Ed. 2d 697; the question is whether the search was unreasonable, Harris v. United States, 331 U. S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399; United States v. Abel, 2 Cir., 258 F. 2d 485, affirmed 362 U. S. 217, 80 S. Ct. 683, 4 L. Ed. 2d 668, rehearing denied 362 U. S. 984, 80 S. Ct. 1056, 4 L. Ed. 2d 1019; Harman v. United States, 4 Cir., 210 F. 2d 58; Smith v. United States, 103 U. S. App. D. C. 48, 254 F. 2d 751, certiorari denied 357 U. S. 937, 78 S. Ct. 1388, 2 L. Ed. 2d 1552.

"Having lawfully opened the case, the agents had the undoubted right to seize any instruments of a crime which they were investigating or the fruits of such a crime. Abel v. United States, 362 U. S. 217, 80 S. Ct. 683, 4 L. Ed. 2d 668, rehearing denied 362

U. S. 984, 80 S. Ct. 1056, 4 L. Ed. 2d 1019; Gouled v. United States, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647; Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746; United States v. Thomson, 7 Cir., 113 F. 2d 643, 129 A. L. R. 1291; United States v. Lerner, N. D. Cal., 100 F. Supp. 765. In view of the report they had received from the Medical Examiner of Virginia and the pistol grips which had been discovered near Carroll Jackson's body, the F. B. I. were looking for a .38 Colt revolver. They even knew the range of serial numbers probably on the revolver used in the crime.

"The search was not unreasonable, and the agents were entitled to seize the revolver."

In light of the foregoing summaries, it is manifest that both State and Federal courts have given exhaustive consideration to the initial question sought to be presented by the petition for writ of certiorari. In each instance, the court found the search in question to be reasonable and the evidence lawfully seized and properly admitted without violation of any constitutional right of the petitioner. Nothing but the redundant or the superfluous could be added by counsel for the respondent to the dispositive observations of Judge Butzner and Chief Judge Thomsen.

Moreover, an analysis of the cases relied upon by petitioner in an attempt to establish a conflict between the decision in the instant case and decisions of other State and Federal courts upon the search and seizure question conclusively reveals that no such conflict exists. The initial decisions cited by petitioner in this connection are *Holzhey* v. *United States*, 5 Cir., 223 F. (2d) 823, and *Sartain* v. *United States*, 9 Cir., 303 F. (2d) 859. The decision in the *Holzhey* case was expressly distinguished on its facts, not only by the trial court in the case at bar, *Rees* v. *Commonwealth*, *supra*, at 805, 127 S. E. (2d) at 416 (ante, p.

6), but also by the United States District Court for the District of Maryland in *United States* v. *Rees*, *supra*, at 854 (*ante*, p. 11). In addition, the decision in *Holzhey* was also expressly distinguished on its facts by the United States Court of Appeals for the Ninth Circuit in *Sartain* v. *United States*, *supra*, in the following language (303 F. (2d) at 862-863):

> "Here we have a situation where a defendant delivers his briefcase and the means of access to it to another, thereby voluntarily surrendering to a large degree his right of privacy. Upon defendant's being arrested and charged on a closely related offense, the person then in control of the bag forwards it through intermediaries to the police. The police, with probable cause for a search, and with reason to believe that control of the bag had been surrendered to the persons who turned it in, conduct a search. The search turns up, not general evidentiary materials, but objects subject to immediate forfeiture and seizure—the very instrumentalities of the crime. *We cannot say of this activity, as was said in Holzhey v. United States, 223 F. 2d 823 (5th Cir. 1955), that it was unreasonable under the circumstances.* In Holzhey, *unlike the instant case*, the defendant had never given the means of access to her possessions to another, she was not being detained on any charge at the time the search was made, and the people in charge of the property did not request the police to investigate and take possession." (Italics supplied).

Clearly, the *Holzhey* and *Sartain* decisions are not in conflict—either with each other or with the case at bar. Even less relevant are the decisions in *United States* v. *Blok*, D.C.Cir., 188 F. (2d) 1019, and *State* v. *Zuehlke*, 239 Wis. 111, 300 N. W. 746. Surely, the question of whether or not a government employee's superior may val-

idly consent to the search of a desk which has been assigned to the exclusive use of the employee in a government office building is not even remotely similar to the question of whether or not a husband and wife (petitioner's parents in the instant case) may validly consent to a search of the premises of their own home, of which premises they are the sole occupants.

Equally unprofitable for petitioner's purpose are *United States* v. *Eldridge*, 4 Cir., 302 F. (2d) 463, and *State* v. *Evans*, 372 P. (2d) 365. In the *Eldridge* case, the United States Court of Appeals for the Fourth Circuit held that a bailee in lawful possession of an automobile owned by his bailor could validly consent to a search of the automobile—a decision which is both irrelevant to the case at bar and in no way inconsistent with the decision of the trial court. In the *Evans* case, the Supreme Court of Hawaii held that a wife in joint occupancy and control of premises with her husband could validly admit police officers to the house, but could not consent to a search of her husband's personal effects to discover jewelry hidden in a cuff link case in a bedroom bureau drawer. Not only is *Evans* manifestly distinguishable upon the ground that the dwelling searched in the case at bar was not the petitioner's home nor was he an occupant thereof, but the Court itself *expressly distinguished by name* the factual situation there under consideration from that which obtains in the case at bar. In this connection, the Court pointed out (372 P. (2d) at 372):

> "The cuff link case opened by the officers clearly was identifiable as the husband's and we do not have here the situation where, at the time of search, it does not appear whose case is being opened. Cf., United States v. Rees, D.C., 193 F.Supp. 849, 852."

Finally, decisions involving the application of Fourth Amendment prohibitions to a governmental search without warrant of packages in first class mail, *Ex parte Jackson*, 96 U. S. 727, or to a similar search of leased premises in the absence of the tenant with consent of the lessor, *Chapman* v. *United States*, 365 U. S. 610, are too obviously foreign to any issue in the case at bar to merit discussion.

In light of the foregoing, counsel for respondent submit that the decision in the case at bar upon the question of search and seizure is thoroughly consistent with applicable decisions of this Court and is not in conflict with those of other State or Federal courts.

II.

The Trial Court Properly Declined to Grant Petitioner's Motion for a Change of Venue or Venire

In his opinion in the trial court, the presiding judge considered at length the question posed by petitioner's motion for a change of venue or venire—and the factual complex in which that question was presented—in the following discussion (203 Va. at 859-861; 127 S. E. (2d) at 412-414):

> "The defendant moved for a change of venue or a change of venire (T. 7-55). In support of these motions he filed one affidavit and called five witnesses.
>
> "The affidavit was given by the publisher of the *Free Lance-Star*, a newspaper published in Fredericksburg, Virginia. It states the circulation of the paper and the amount of news coverage pertaining to the case. No claim was made by the defendant and no evidence was introduced that the articles in the newspaper were inflammatory, prejudiced, or biased against the defendant. There was no evidence that the articles were anything other then factual news accounts. This is not sufficient to warrant a change of venue or a

change of venire. *Hampton* v. *Commonwealth*, 190 Va. 531, 58 S. E. 2d 288 (1950), *cert. denied*, 339 U. S. 989 (1950).

"In the opinion of some of the defendant's witnesses an undisclosed number of people in the county were of the opinion that the defendant was guilty. It further appeared that this opinion was based primarily upon what some of the people had read in the newspapers and heard on the radio. One of the witnesses expressed the opinion that the defendant could not receive a fair and impartial trial in the county.

"There was no evidence introduced of mass prejudice against the defendant, of mob action, or threat of such action. There was no evidence of inflammatory newspaper editorials or interviews, or provocative radio or television commentaries. There was no evidence that it was the predominant belief in the county that the defendant was guilty. There was no evidence that it was the predominant belief among the people of the county that the defendant could not receive a fair and an impartial trial.

"The Commonwealth introduced the evidence of three witnesses. The gist of this testimony is that the defendant could receive a fair and impartial trial in the County. The attorney for the Commonwealth advised the Court that he had summoned thirty-two additional witnesses who were present and ready to testify. He stated, however, that their evidence would be cumulative. The Court indicated that it did not wish to hear cumulative evidence because the issue on the motions should be decided on the evidence presented and not on the number of witnesses called to testify for one party or the other.

"The lack of hostility and prejudice is not difficult to understand. Jackson's death occurred almost thirty months before the hearing on the motions. It is well established that the Court must look to conditions at the time of the trial and not the conditions at the time

of the homicide. *Evans* v. *Commonwealth*, 161 Va. 992, 170 S. E. 756 (1933).

"Interest, agitation, and apprehension concerning the case had diminished over the intervening years. Moreover, the Jackson family were not residents of Spotsylvania County. They lived in Louisa County and there was no evidence to indicate that they were closely related or well known in Spotsylvania County. Nor was the defendant known in Spotsylvania County.

"Throughout the trial there was no indication of any hostility, prejudice, bias or mob action against the defendant. Often the small courtroom was not filled. During the latter stages of the trial, particularly when it was expected that the defendant's witnesses would testify, more spectators appeared at the courthouse than could be accommodated in the courtroom. The majority of these spectators were women and they appeared to be present out of curiosity. There were no demonstrations of any kind against the defendant—either inside or outside the courtroom."

* * *

"The jury was selected on September 18th and during the morning of September 19th. The Court previously had ordered additional jurors to be drawn and summoned so seventy-five jurors would be in attendance. Several presented evidence of ill health, and they were excused. A number of farmers qualified upon the *voir dire* examination, but upon suggestion of defense counsel claimed their right of exemption. At the end of the first day, the panel was exhausted, but nineteen veniremen had qualified under the examination of the Court and the searching examination of counsel.

"The defendant thereupon renewed his motions which the Court overruled pointing out that a panel of twenty jurors and four alternates would have been selected had it not been for the exclusion of farmers who claimed their exemption. The Court thereupon

caused to be summoned twenty-five additional jurors for attendance upon the Court the next day. From these the panel of twenty was completed and four alternates were selected, all of whom were qualified jurors.

"The defendant cites *Irvin* v. *Dowd*, 366 U. S. 717 (1961). The facts in that case are so different from the case at bar that it is not decisive of the issues here. There the build-up of prejudice was clear and convincing. Here there is no evidence of prejudice.

"Some veniremen stated they had formed some impression or opinion from what they had read in newspapers, or heard on television and radio. This alone is not a reason for disqualification, *Irvin* v. *Dowd*, 366 U. S. 717, 722 (1961), *Ballard* v. *Commonwealth*, 156 Va. 980, 999, 159 S. E. 222, 229 (1931).

"No juror who was selected had a fixed opinion which repelled the presumption of innocence. The defendant did not object to the inquiries which the Court made on *voir dire*, nor did the defendant except to rulings of the Court concerning the qualifications of the jurors."

* * *

"The Court is of the opinion that nothing concerning the background, circumstances, or trial of this case justified granting the defendant's motion for a change of venue or venire."

Once again, counsel for the respondent feel that little of substance can be added to the exhaustive disquisition of the trial court upon the question sought to be presented by this segment of the petition for writ of certiorari. However, in light of the matters contained in Appendix A to said petition, one aspect of the trial court's opinion must be emphasized.

In this connection, it should be noted that (1) in support

of his motion for a change of venue or venire, petitioner filed only one affidavit and called five witnesses (2) the affidavit merely stated the circulation of the local newspaper and the amount of news coverage pertaining to the case and (3) there was no evidence whatever of inflammatory newspaper editorials or interviews, or of provocative radio or television commentaries. See, *Rees* v. *Commonwealth*, *supra*, at 850, 127 S. E. (2d) at 412-413 (ante, pp. 15-16). However, in Appendix A to the petition for writ of certiorari, counsel for petitioner have apparently attempted to catalogue various newspaper articles relating to the instant case, which articles allegedly appeared in newspapers published in Washington, D. C., and Richmond, Virginia, in addition to those which allegedly appeared in the local newspaper. The compilation also contains what purports to be excerpts from the articles listed or descriptive summaries of their contents. *None of the above-mentioned material embraced in Appendix A to the petition for writ of certiorari was offered in evidence in this case, none of it has been considered by any court during the prior judicial proceedings in this case and none of it is a part of the record in this case or available for consideration by this Court.* Manifestly, the bulk of petitioner's argument upon this aspect of the petition for writ of certiorari is predicated upon matters which have no foundation in the record.

In any event, the decisions relied upon by petitioner furnish no support for the contention that his constitutional right to a fair trial was infringed by the court's refusal to grant a change of venue or venire in the case at bar. In this connection, petitioner's glancing reference to *Marshall* v. *United States*, 360 U. S. 310, is appropriately brief. In that case, newspaper articles prejudicial to the accused were read by a substantial number of jurors during the course

of the trial, a circumstance necessitating interruption of the trial for examination of such jurors by the presiding judge. Moreover, the decision in *Marshall* was not impelled by constitutional considerations but was distinctly posited upon this Court's "supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts. . ." Id., at 313.

Irvin v. *Dowd*, 336 U. S. 717, was expressly distinguished by the trial court in the instant case in the following language (203 Va. at 861, 127 S. E. (2d) at 414):

> "The defendant cites *Irvin* v. *Dowd*, 366 U. S. 717 (1961). *The facts in that case are so different from the case at bar that it is not decisive of the issues here.* There the build-up of prejudice was clear and convincing. Here there is no evidence of prejudice." (Italics supplied).

The factual variance referred to by the trial court is easily demonstrable. In *Irvin* (1) the accused's trial took place within twelve months of the date of the first of the six murders there in question (2) the accused was granted one change of venue because of widespread and inflammatory publicity concerning the crimes (3) curbstone opinions concerning the accused's guilt and the punishment he should receive were openly solicited on the streets and broadcast on local stations (4) voir dire examination of prospective jurors consumed four weeks time prior to trial (5) 370 prospective jurors (some 90% of those examined) entertained an opinion as to the accused's guilt (6) eight out of twelve jurors finally placed in the jury box thought the accused was guilty before hearing any testimony (7) a pattern of deep and bitter prejudice against the accused was shown to be present throughout the community.

In striking contrast is the situation here under consideration. In the case at bar, (1) petitioner's trial did not take place until some 2½ years after the homicide with which he was charged (2) interest, agitation and apprehension concerning the case had diminished during the intervening years (3) the victim of the homicide and his family were not residents of Spottsylvania County nor was there evidence that they were closely related or well known in the county (4) the petitioner was not known in Spottsylvania County (5) a panel of twenty qualified jurors and four alternates was selected from a total of 100 persons summoned for jury duty, and would have been selected from the initial venire of 75 persons summoned had it not been for the exclusion of certain farmers who claimed their exemption (6) no juror who was selected had a fixed opinion which repelled petitioner's presumption of innocence (7) no pattern of hostility, passion or prejudice against the petitioner existed at the time of his trial.

Clearly, the trial judge correctly determined that the factual situation in the *Irvin* case was so different from that which obtained in the case at bar that the decision in the former case was not decisive of the issues here. In addition, that decision can hardly be considered procedural precedent for the granting of a writ of certiorari in the instant case. In *Irvin*, this Court initially denied direct review by certiorari "without prejudice to filing for federal habeas corpus" after exhausting State remedies, 353 U. S. 98, and the Court's decision in that case was rendered following a grant of certiorari to a judgment by the United States Court of Appeals for the Seventh Circuit in habeas corpus proceedings adjudicating the Fourteenth Amendment (fair trial) claim adversely to the accused.

In light of the foregoing, counsel for the respondent sub-

mit that no constitutional right of the petitioner was infringed by the trial court's refusal to grant a change of venue or venire in the case at bar.

CONCLUSION

For the foregoing reasons, counsel for the Commonwealth submit that the petition for writ of certiorari in this case should be denied.

Respectfully submitted,

ROBERT Y. BUTTON
Attorney General of Virginia

R. D. MCILWAINE, III
Assistant Attorney General

Supreme Court – State Library Building
Richmond 19, Virginia

APPENDIX A

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON 25, D. C

February 18, 1963

The Honorable Robert Y. Button
Attorney General of Virginia
Richmond 10, Virginia

RE: REES v. VIRGINIA

No. 720, October Term, 1962

Dear Sir:

A petition for writ of certiorari was filed in this Court on January 4, 1963 in the above-entitled case, and my records indicate that you were served with a copy of the petition on or about January 4, 1963.

I have been directed by the Court to request that you file a response to such petition and 40 copies of your response, with service, should reach this office on or before March 20, 1963.

Very truly yours,

JOHN F. DAVIS, Clerk
By /s/ E. P. Cullinan
Chief Deputy

EPC: jmh
cc: S. White Rhyne, Jr., Esquire
515 Southern Building
Washington 5, D. C.